STATE OF MICHIGAN

IN THE THIRD CIRCUIT COURT OF MICHIGAN

R & K TECH VENTURES, LLC,
a Delaware Limited Liability Company,

Plaintiff,

-v-

QFL, LLC, a Delaware Limited Liability Company, and KEVIN J. PIECUCH,

Defendants.

Case No. 14-002647-CK
Hon. Daniel P. Ryan

OPINION

I. Introduction

This action is before the Court on a motion for summary disposition filed by Defendants, QFL, LLC ("QFL"), and Kevin J. Piecuch (collectively referred to as "Defendants") under MCR 2.116(C)(8) and (10). For the reasons more fully explained below, the Court will grant in part and deny in part Defendants' motion.

II. Factual Background and Procedural History

Plaintiff, R & K Tech Ventures, LLC ("R & K") is in the business of manufacturing certain fat burning equipment, and leasing it to weight loss centers that sell the use of such machines to the general public (Complaint, ¶ 6). QFL, operating under the trade name "Bodylight," owned and/or operated weight loss centers throughout the Detroit metropolitan area (Complaint ¶¶ 7-8). Each location was incorporated as a separate LLC with QFL serving as the majority owner and managing member (Complaint, ¶ 8).

Between September 2013 and December 2013, all of the fat burning equipment

used by the Bodylight centers was leased from R & K to QFL, and then subleased to the various entities (Complaint, ¶ 9). In the summer of 2013, QFL engaged R & K to manufacture and lease fat burning equipment for centers intended to open in the fall of 2013 (Complaint ¶ 10). R & K and QFL entered into a verbal agreement whereby QFL would pay $5,000 for each machine as an acquisition fee, plus a rental amount of $2,700 per month for one fat burning machine and one facial machine (Complaint ¶ 11).

R & K then manufactured six fat burning machines and four facial machines for the Bodylight centers (Complaint, ¶ 12). Since QFL requested expedited manufacturing and delivery dates, R & K expended an additional $18,000 in overtime for its workers so that it could meet the deadlines requested by QFL (Complaint ¶ 13). R & K delivered six fat burning machines and four facial machines to QFL in September and October 2013 (Complaint, ¶ 14). QFL accepted delivery and used the equipment in September, October and November 2013 (Complaint, ¶ 15).

R & K alleges that Piecuch subsequently attempted to change the terms of the agreement. It ultimately notified Piecuch in writing that it no longer wanted to do business with QFL. Piecuch tendered a check for $42,800 drawn against QFL's account, and wrote "full payment" on the check. R & K rejected the check, requesting that it be reissued without the notation, Piecuch ostensibly indicated that he would be willing to submit a check for $32,500, which was $10,300 less than the original check.

On March 3, 2014, Plaintiff filed the instant lawsuit, alleging: (1) breach of contract (Count I); (2) promissory estoppel (Count II); (3) fraud (Count III); and (4) unjust enrichment (Count IV).Defendants now move for summary disposition as to Counts III and IV of R & K's Complaint.

III. Standard of Review

Summary disposition may be granted under MCR 2.116(C)(8) when a plaintiff fails to state a claim on which relief can be granted. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). It may not be supported with documentary evidence. *Mable Cleary Trust v Edward Marlah Muzyl Trust*, 262 Mich App 485, 491; 686 NW2d 770 (2004). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Dep't of Transportation v N Central Coop, LLC,* 277 Mich App 633, 636; 750 NW2d 234 (2008), rev'd on other grounds 481 Mich 862; 748 NW2d 239 (2008).

A motion for summary disposition based on MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court reviews a motion brought on the basis of MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

IV. Analysis

1. Fraud

R & K sets forth allegations of fraud in Count III of its complaint. These allegations are challenged by Defendants on the ground that they have not been pleaded with particularity, which is required by MCR 2.112(B)(1). See *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008). However, Defendants only take issue with paragraph 25 of R & K's complaint in which R &K alleges that QFL "made clear, definite and specific promises." According to Defendants, R & K has failed to specify when and where promises were made, or how those promises constituted fraud. However, the paragraph relied on by Defendants is situated in R & K's claim for promissory estoppel (paragraphs 24 through 29 of the complaint), and thus, relates to that count. On their face, the representations pertinent to R & K's fraud claim have been plead with sufficient specificity in paragraphs 30 through 37 of the complaint.

Next, Defendants attack the factual sufficiency of R & K's fraud claim, the elements of which are that: (1) the defendant made a representation that was material, (2) the representation was false, (3) the defendant knew the representation was false, or the defendant's representation was made recklessly without any knowledge of the potential truth, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff actually acted in reliance, and (6) the plaintiff suffered an injury as a result. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012). Here, Defendants contest the first four elements.

As for the first element, Defendants contend that Piecuch was the president of QFL,

and was not a party to the verbal agreement, but acted at all times as QFL's representative and thus, did not personally make any representations. It necessarily follows, then, per Defendants, that R &K's fraud claim against Piecuch can only be maintained if he is held personally liable for representations made on behalf of QFL by piercing the corporate veil.[1]

Yet, Defendants have not submitted any deposition testimony[2] or affidavits in support of their position. At best, the document referred to by Defendants in Exhibit 5 of their brief in support of their motion for summary disposition demonstrates that Piecuch was the president of Vivir, Inc, an apparent Michigan corporation.

With respect to the second element, Defendants initially indicate that they are uncertain about which terms of the agreement between the parties were allegedly false. In paragraph 33 of the complaint, though, R & K expressly states that the allegations in the previous paragraph were false (Complaint, ¶ 32).[3] Defendants then argue that there were no false representations because they tendered payment to R & K, but their check

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1 In this regard, Defendants suggest that Piecuch is not a proper party. This issue is one of fact given the present evidence on the record.

2 Although Defendants cite certain deposition testimony of Piecuch, they have not furnished it to the Court, nor has it been made part of the record.

3 Paragraph 32 of the complaint provides:

> Specifically, they represented that if R & K manufactured and delivered certain fat burning equipment QFL would pay Five Thousand ($5,000.00) Dollars for each machine manufactured and delivered as an acquisition fee as well as a monthly rental amount of Two thousand seven Hundred ($2,700.00) Dollars per month. They further represented that they would enter into a written lease incorporating those basic payment terms.

was rejected. As indicated above, R & K claims that the check did not represent the correct amount. Therefore, whether the payment made by Defendants reflected the amount agreed to by the parties is a fact question.

Regarding the third element, Defendants insist that no knowingly false representation was made, merely maintaining that there are no facts to establish the third element. Respecting the fourth element, Defendants suggest that R & K cannot show the requisite intent because negotiations between the parties failed in November 2013, which is something that "Piecuch did not anticipate" (Defendants' Brief in Support of Motion for Summary Disposition, p 15).

As the moving party, however, Defendants have the initial burden of supporting its position by affidavits, depositions, admissions or other documentary evidence. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 134; 463 NW2d 442 (1990). Only then does the party opposing the motion, R & K, have the burden of showing that a genuine issue of disputed fact exists. *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 773; 447 NW2d 864 (1989). Defendants have not come forward with any evidence relative to the third element.

Defendants' arguments having failed, Defendants' motion for summary disposition as to R & K's fraud claim is denied.

2. Unjust Enrichment

In Count IV of its complaint, R & K alleges unjust enrichment, which necessitates: (1) receipt of a benefit by the defendant from the plaintiff, and (2) an inequality resulting to plaintiff because of the retention of the benefit by defendant. *Barber v SMH (US), Inc*,

202 Mich App 366, 375; 509 NW2d 791 (1993). In such circumstances, the law operates to imply a contract in order to prevent unjust enrichment. I*d*. However, a contract will be implied only if there is no express contract covering the same subject matter. *Id*. Generally, an implied contract may not be found if there is an express contract between the same parties on the same subject matter. *Id*.

Where, as here, it is undisputed that there is an express contract between the parties, R & K's claim for unjust enrichment is not actionable. See *Morris Pumps v Centerline Piping, Inc*, 272 Mich App 187, 194; 729 NW2d 898 (2006)(unjust enrichment not available where express contract governs the matter at issue). Defendants' motion for summary disposition is accordingly granted as to R & K's unjust enrichment claim.

V. Conclusion

In view of the foregoing, Defendants' Motion for Summary Disposition is granted as to R & K's claim for unjust enrichment, and denied with respect to R & K's fraud claim.

/s/ Daniel P. Ryan
Circuit Judge

DATED: 3/26/2015